

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2008 Session

JAN BOTTORFF v. ROBERT E. BOTTORFF, JR.

**Appeal from the Circuit Court for Davidson County
No. 06D-627 Carol Soloman, Judge**

No. M2007-01792-COA-R3-CV - Filed July 21, 2008

In this divorce action, Husband appeals numerous aspects of the trial court's ruling. The trial court granted a divorce to Wife and awarded her alimony *in futuro* and attorney's fees and ordered Husband to maintain a life insurance policy to secure his alimony obligation. Husband appeals, contending the duration and amount of alimony is excessive, the award of attorney's fees is inappropriate under the circumstances, and the requirement that he maintain a \$200,000 life insurance policy for the benefit of Wife is unnecessary. Finding, *inter alia*, the parties' relative income and standard of living to be disproportionate, we affirm the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Jon S. Jablonski, Nashville, Tennessee, for the appellant, Robert E. Bottorff, Jr.

Philip E. Smith, Nashville, Tennessee, for the appellee, Jan Bottorff.

OPINION

On February 23, 2006, Jan Bottorff ("Wife") filed a complaint for divorce against Robert E. Bottorff, Jr., ("Husband") in Davidson County, alleging, *inter alia*, that her Husband had committed adultery.¹ The parties had been married since 1971, during which time they had two children, both of whom reached the age of majority prior to this action being filed.

¹In her original Complaint, filed February 23, 2006, Wife filed for divorce on the sole grounds of irreconcilable differences. During the discovery process, however, Husband admitted to engaging in adulterous relationships. As the result of this development, Wife amended her complaint, seeking a divorce on the additional grounds of adultery and inappropriate marital conduct.

During their first four years of marriage, Husband served in the United States Air Force, where he served in various locations throughout the country and Guam. Shortly after Husband's honorable discharge from the military in 1975, Husband accepted a position with the telephone company South Central Bell in Nashville, Tennessee, and moved there with his family.

For the next twenty-one years, Husband continued to work for the telephone company, and Wife worked as an education assistant at a Nashville school and served as the primary caregiver to the parties' now adult children.² In 1996, Husband's employment in Tennessee was in jeopardy, and he moved to California to accept a position with a television company that was seeking to enter into the telecommunications market. Wife remained in Nashville with the understanding that Husband's stay in California would be temporary. Husband, however, never returned to live in Nashville.

In California, Husband succeeded financially, earning an average of \$108,631 per year.³ He lived a most comfortable lifestyle and traveled around the world to exotic places. Wife, on the other hand, remained employed as an education assistant in Nashville, earning an average salary of \$13,928 per year. She lived a frugal, non-lavish lifestyle.⁴

After ten years of the parties living on opposite ends of the country in different states, Wife filed a Complaint for divorce, alleging irreconcilable differences. During discovery, it came to light that there was more to the story. As a result of Husband's deposition, Wife learned for the first time that Husband was engaged in an adulterous relationship in California and had been involved in similar relationships prior to moving to California. Upon learning of her husband's infidelity, Wife amended her Complaint for divorce, adding the grounds of adultery and inappropriate marital conduct. Husband filed an Answer and Counter-Complaint, wherein, he admitted adultery.

The court conducted a trial on the merits on March 6, 2007. On May 8, 2007, the trial court entered a Final Decree of Divorce, wherein it awarded Mother the divorce on grounds of adultery. Furthermore, the trial court awarded Wife alimony *in futuro* in the amount of \$2,800 per month, continuing until Wife's death or remarriage. The trial court ordered that Husband must maintain a life insurance policy of \$200,000 to secure the alimony award. Additionally, the trial court awarded Wife \$6,581 in attorney's fees. This appeal followed.

Husband asserts that the trial court erred in (1) setting both the amount and duration of the alimony *in futuro*; (2) requiring Husband to pay Wife's attorney's fees; and (3) requiring Husband to maintain \$200,000 of life insurance to secure the alimony award.

² Mother worked at a fast food restaurant and at a church's Mother's Day Out program prior to her employment as an education assistant.

³ Husband's salary was averaged over six years.

⁴ Husband often sent \$1,000 per month to Wife to assist her with her necessities.

ANALYSIS

Alimony In Futuro

Husband challenges the award of alimony *in futuro* on two grounds. He contends Wife was not entitled to alimony *in futuro*, and he contends the award of \$2,800 per month is excessive.

We review an award of alimony under the abuse of discretion standard. *Herrera v. Herrera*, 944 S.W.2d 379, 388 (Tenn. Ct. App. 1996). Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

When determining whether an award of alimony is appropriate, courts must consider the statutory factors in Tenn. Code Ann. § 36-5-121(i) of which we consider the need of the spouse seeking support and the ability of the other spouse to provide such support to be the most important. *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007). Alimony decisions require a careful consideration of the relevant factors in Tenn. Code Ann. § 36-5-121(i) and typically hinge on the unique facts and circumstances of the case. *Oakes*, 235 S.W.3d at 160; *see also Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998).

The relevant factors to be considered under Tenn. Code Ann. § 36-5-121(i) when determining whether to award alimony include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;

- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i)

While a trial court should consider all the relevant factors under the circumstance, the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007)(citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002)). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Id.* (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App.1999)).

Once the trial court has determined that alimony is appropriate, it must determine the nature, amount, and period of time of the award. The court may award "rehabilitative alimony, alimony in futuro, also known as periodic alimony, transitional alimony, or alimony in solido, also known as lump sum alimony or a combination of these" Tenn.Code Ann. § 36-5-121(d)(1).

In the present matter, the trial court elected to award alimony *in futuro*. An award of alimony *in futuro* is appropriate "where there is relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors," including those enumerated in § 36-5-121(i). Tenn. Code Ann. § 36-5-121(d)(3).⁵ According to Tenn. Code Ann. § 36-5-121(f)(1):

Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that *the disadvantaged spouse is unable to achieve . . . an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable . . . to the post-divorce standard of living expected to be available to the other spouse . . .*

Tenn. Code Ann. § 36-5-121(f)(1) (emphasis added).

⁵ A benefit of alimony *in futuro* is that it can be modified in the event of a substantial and material change in circumstances. "An award of alimony *in futuro* shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances." Tenn.Code Ann. § 36-5-121(f)(2)(A).

The relevant facts in the record, as supported by the trial court's findings of fact, reveal the following: At the time of the trial, Wife was fifty-four (54) years old and had little in the way of formal education. She graduated from high school, but did not attend college. Wife served as the children's primary caregiver, and also worked as an education assistant for the previous seventeen (17) years at a local private school, where she earned an average salary of \$13,928 per year. The trial court specifically found that her earning capacity was "very limited." Husband, on the other hand, earned an average of over \$108,000 per year and lived a "lavish and extravagant" lifestyle. While living in California, Husband took various trips to exotic locales including South Africa, Saudi Arabia, Egypt, Brazil, Jamaica, Mexico, China and Spain. Moreover, Husband's girlfriend accompanied him on many of these trips. Providing an appropriate summary for the situation, the trial court stated, "The husband has had a great life as a single man when he wasn't single. He's lived a lush lifestyle and traveled all over the world in a lush environment."

Based on the foregoing facts, the trial court found that "rehabilitation is not feasible" and thus awarded Wife alimony *in futuro*. The amount and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs*, 250 S.W.3d at 456-57 (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). The appellate courts will not alter such awards absent an abuse of discretion. *Id.* Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). Considering the profound discrepancy in the parties' respective earning capacities, Wife is clearly the disadvantaged spouse and is entitled to alimony. Moreover, considering Wife's lack of formal education, her age, and the limited scope of her work experience, rehabilitation is not appropriate. Accordingly, we find no error with the trial court's decision to award Wife alimony *in futuro*.

Husband contends the amount of alimony is excessive. There are no hard and fast rules for spousal support decisions, *see Anderton*, 988 S.W.2d at 682; *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996), and as we indicated earlier, the amount of alimony is within the sound discretion of the trial court in light of the particular circumstances of each case and this court will not alter an award absent an abuse of discretion. *Riggs*, 250 S.W.3d at 457 (citing *Lindsey*, 976 S.W.2d at 180).

The record shows that Wife has a negative net income of \$700 per month, and we find this significant because she is not overspending. To the contrary, she is most frugal and has been for years out of necessity. Husband, on the other hand, has a significant income and some of the significant monthly expenses he claimed were due in principal part to his lavish life style and to financially assisting or supporting others, to whom he has no legal obligation of support.⁶ Considering the post-divorce standard of living of the two ex-spouses and other relevant facts,

⁶Husband included in his expenses two outstanding credit card balances for his adult daughter and payment for his adult children's travel.

including specifically the financial needs of Wife and the ability of Husband to pay, we find no error with the trial court's decision to award Wife \$2,800 per month as alimony *in futuro*.

Attorney's Fees

Husband contends the trial court erred by awarding Wife attorney's fees in the amount of \$6,581. He contends that Wife will have the ability to pay her attorney's fees as a result of the proceeds she will receive from the sale of the parties' home in Nashville.

An award of attorney's fees in a divorce case constitutes alimony *in solido*. *Anzalone v. Anzalone*, No. E2006-01885-COA-R3-CV, 2007 WL 3171132 (Tenn. Ct. App. Oct. 30, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App.1996)). When determining whether to award attorney's fees, the trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i). See *Echols v. Echols*, No. E2006-02319-COA-R3-CV, 2007 WL 1756711 at *7 (Tenn. Ct. App. June 19, 2007) (no Tenn. R. App. P. 11 application filed). Because awards of attorney's fees are within the sound discretion of the trial court, we will not disturb the award on appeal absent an abuse of discretion. *Anzalone*, 2007 WL 3171132 at *7 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn.2002)).

We have already determined that Wife is entitled to alimony due in part to the significant discrepancy in the parties' respective incomes. Taking into account the facts discussed in detail above, we find no abuse of discretion in the trial court's determination that an award of attorney's fees of \$6,581 was reasonable under the circumstances.

Life Insurance to Secure Alimony Obligation

Lastly, Husband contends the trial court erred by ordering him to maintain a life insurance policy in the amount of \$200,000 to secure the award of alimony in the event of his death. We review the trial court's determination based upon an abuse of discretion standard. *Young v. Young*, 971 S.W.2d 386, 392 (Tenn. Ct. App. 1997).

Tennessee Code Annotated § 36-5-121(k) provides that, to secure an alimony obligation, the court may order a party to maintain a life insurance policy with the other party as the beneficiary.⁷ Although Husband does not dispute the trial court's authority to order such an award, he contends that the amount was excessive. He also contends that if he were to lose the life insurance benefit, which is derived from his employment, he may be unable to fulfill this obligation. We find no error with the amount of life insurance Husband is required to maintain. Further, the order requiring

⁷"To secure the obligation of one party to pay alimony to or for the benefit of the other party, the court may direct a party to designate the other party as the beneficiary of, and to pay the premiums required to maintain, any existing policies insuring the life of a party, or to purchase and pay the premiums required to maintain such new or additional life insurance designating the other party the beneficiary of the insurance, or a combination of these, as the court deems appropriate." Tenn. Code Ann. § 36-5-121(k).

Husband to maintain life insurance to secure his alimony obligation is modifiable. *See Young*, 971 S.W.2d at 393. Accordingly, we affirm the trial court on this issue as well.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Robert E. Bottorff, Jr.

FRANK G. CLEMENT, JR., JUDGE